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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

AMANDA GEORGINO, an individual,
on behalf of herself and all others
similarly situated,

Plaintiff,

vs.

SUR LA TABLE, INC., a Washington
corporation; and DOES 1 through 50,
inclusive,

Defendants.

Case No.: 2:11-CV-03522-MMM-JEM

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF PLAINTIFFS'
UNOPPOSED MOTION FOR
PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT**

[Filed concurrently with Class Action
Settlement Agreement; Declaration of
Gene J. Stonebarger; and Proposed
Order]

Date: December 17, 2012

Time: 10:00 a.m.

Judge: Hon. Margaret M. Morrow

AND CONSOLIDATED CASES

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1 **I. INTRODUCTION**

2 This is a putative class action brought by Plaintiffs Amanda Georgino,
3 Nancy Dardarian, and Linda Petersen ("Plaintiffs") on behalf of themselves and all
4 other consumers who purchased merchandise from stores owned and operated by
5 Sur La Table, Inc. ("Sur La Table " or "Defendant") in California, used a credit
6 card to make an in-store purchase, and whose personal identification information
7 was requested and recorded by a Sur La Table employee.

8 Sur La Table is a retailer which owns and operates stores throughout
9 California. This action arises from Sur La Table's alleged violation of the Song-
10 Beverly Credit Card Act, codified as California Civil Code section 1747.08
11 ("Section 1747.08"), by and through its alleged practice of requesting and
12 recording personal identification information from its customers using credit cards
13 at Sur La Table's retail stores in California.

14 Sur La Table denies all claims of wrongdoing and asserts several affirmative
15 defenses on the grounds that it did not violate the Song-Beverly Credit Card Act or
16 any other laws relating to its alleged conduct.

17 After extensive arms-length negotiations, including a full day mediation
18 session with Michael Dickstein, Esq. of Dickstein Dispute Resolution, Plaintiffs
19 and Sur La Table (collectively, the "Parties") have entered into a Settlement
20 Agreement and Release (the "Settlement Agreement," a true and correct copy of
21 which is filed concurrently and attached to the Declaration of Gene J. Stonebarger
22 ("Stonebarger Decl.") as **Exhibit '1'**).

23 Plaintiffs' counsel believes that the proposed settlement is fair, reasonable
24 and adequate; therefore, Plaintiffs now move the Court for an order: (1)
25 preliminarily approving the Settlement Agreement as being fair, reasonable, and
26 adequate; (2) provisionally certifying the Class under Federal Rule of Civil
27 Procedure 23 for settlement purposes only; (3) preliminarily approving the form,
28 manner, and content of the Class Notices and Claim Form; (4) appointing Plaintiffs

1 Amanda Georgino, Nancy Dardarian, and Linda Petersen as the Class
2 Representatives; (5) appointing the law firms of Stonebarger Law, APC, Patterson
3 Law Group, APC, and Hoffman & Lazear as counsel for the Class; and (6) setting
4 the date and time of the Fairness Hearing.

5 **II. PROCEDURAL HISTORY**

6 **A. The Georgino Action**

7 On or about February 16, 2011, Plaintiff Amanda Georgino filed a class
8 action complaint in the Los Angeles County Superior Court entitled *Amanda*
9 *Georgino v. Sur La Table, Inc.*, Case No. BC455406, in which she alleged claims
10 on her own behalf and on behalf of all others similarly situated for violations of
11 California's Song-Beverly Credit Card Act, Civil Code section 1747.08 (the
12 "Georgino Action").

13 On or about April 25, 2011, Sur La Table removed the Georgino Action to
14 the Central District of California where it was assigned the case number CV11-
15 03522-MMM (JEMx).

16 **B. The Dardarian Action**

17 On or about March 1, 2011, Plaintiff Nancy Dardarian filed a class action
18 complaint in the Northern District of California entitled *Nancy Dardarian v. Sur*
19 *La Table, Inc.*, Case No. 3:11-cv-00948-CRB, in which she alleged claims on her
20 own behalf and on behalf of all others similarly situated violations of California's
21 Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Dardarian
22 Action");

23 **C. The Petersen Action**

24 On or about March 15, 2011, Plaintiff Linda Petersen filed a class action
25 complaint in the Northern District of California entitled *Linda Petersen v. Sur La*
26 *Table, Inc.*, Case No. 3:11-cv-01254-CRB, in which she alleged claims on her own
27 behalf and on behalf of all others similarly situated for violations of California's
28 Song-Beverly Credit Card Act, Civil Code section 1747.08 (the "Petersen

Action");

D. Court's Order Consolidating the Georgino, Dardarian and Petersen Actions

On or about August 29, 2011, the Honorable Charles R. Breyer transferred the Dardarian Action and the Petersen Action to the Central District of California pursuant to 28 U.S.C. §1404(a).

On or about November 8, 2011, the Hon. Margaret M. Morrow ordered the Georgino, Dardarian and Petersen Actions consolidated under case number CV11-03522-MMM(JEMx) (the "Action").

E. Settlement Negotiations

Plaintiffs engaged in formal discovery and analyzed the relevant legal issues with regards to the claims in, and potential defenses to, the Action. Stonebarger Decl. at ¶3. Plaintiffs also considered the uncertainties of trial and the benefits to be obtained under the proposed Settlement and have considered the costs, risks, and delays associated with the continued prosecution of this time-consuming litigation and the likely appeals of any rulings in favor of either Plaintiffs or Defendant. *Id.* The Parties believe their respective positions in the Action are meritorious. *Id.* However, due to the uncertainties and expense of protracted litigation, Plaintiffs decided it is in the best interest of Plaintiffs and the Class to explore mutual resolution of the Action. *Id.*

Accordingly, on August 21, 2012, the Parties participated in an all-day mediation conducted by Michael Dickstein, Esq. of Dickstein Dispute Resolution, an experienced mediator. *Id.* at ¶4. Following the mediation, the Parties, through their respective counsel, continued to negotiate through the mediator and ultimately agreed on the material terms. The terms of the settlement between the Parties are embodied in the Settlement Agreement. *Id.* at ¶2; Exh. '1'.

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1 **III. BASIC ELEMENTS OF THE PROPOSED SETTLEMENT**

2 **A. Class Benefits**

3 Within forty-five (45) days after the Court enters its order granting
4 Preliminary Approval of the Settlement, all Class members for whom Defendant
5 has an email or home address ("Known Class Members") will be directly emailed
6 or mailed a Merchandise Certificate in the amount of \$13.00 ("Merchandise
7 Certificate"). All unknown Class members for whom Defendant does not have an
8 email or home address ("Unknown Class Members") who timely return a valid
9 claim form will also be directly sent a Merchandise Certificate within thirty (30)
10 days after the Judgment becomes final. The Merchandise Certificates will be
11 redeemable upon delivery for twelve (12) months for new merchandise purchases
12 only at any of Defendant's retail stores, are freely transferable, and have no
13 restrictions on use. *See* Settlement Agreement, § III (B).

14 **B. Class Notice**

15 The Notice of Class Action Settlement will be provided through the
16 following methods:

17 **1. *Direct Mail or Email Notice***

18 Within forty-five (45) days after the Court enters its order granting
19 Preliminary Approval of the Settlement, Sur La Table will email, or if no email
20 address is available, mail, the Summary Postcard Class Notice (substantially in the
21 form attached as **Exhibit E** to the Settlement Agreement) and a merchandise
22 certificate with the value of \$13 to all Known Class Members. *See* Settlement
23 Agreement § III (E)(2)(a). Prior to mailing the Summary Postcard Notice and
24 merchandise certificate to Known Class Members, Defendant will conduct a
25 National Change of Address search for all Known Class Member's current postal
26 address.

27 Known Class Members for whom the Summary Postcard Class Notice is
28 returned as undeliverable will be removed from the group of Known Class

Members and will not be directly mailed a merchandise certificate.

2. In-Store Notice

Within forty-five (45) days after the Court enters its order granting Preliminary Approval of the Settlement, Defendant will post at each of the points of sale in each of its California stores a clear and conspicuous copy of the Summary In-Store Notice (substantially in the form attached as **Exhibit F** to the Settlement Agreement) containing instructions for Unknown Class Members to submit a claim, elect not to participate or object. These notices will remain posted in Defendant's California stores for at least thirty (30) days. *See* Settlement Agreement § III (E)(2)(d).

3. Settlement Website

Within twenty-one (21) days after the Court enters its order granting Preliminary Approval of the Settlement, Defendant will cause a Settlement Website to be set up. The Settlement Website will be active until the Judgment becomes final and will contain information relating to the Settlement, including a long form Class Notice and a downloadable Claim Form for Unknown Class Members. *See* Settlement Agreement § III (D).

C. Completing Claim Forms

Unknown Class Members will have ninety (90) days after the Court enters its order granting Preliminary Approval of the Settlement ("Claim Deadline") to complete in full, sign and return to the Settlement Administrator a timely Claim Form (substantially in the form of **Exhibit G** to the Settlement Agreement) to receive a merchandise certificate. The date of the postmark on the return envelope will be the exclusive means used to determine whether a Class member has "timely" returned the Claim Form by the Claim Deadline.

D. Right to Elect Not to Participate in the Settlement

Class members who wish to exclude themselves from the Settlement must mail to the Settlement Administrator, not later than ninety (90) days after the Court

1 enters its order granting Preliminary Approval of the Settlement, a signed and
2 notarized Election Not to Participate in Settlement. A Class member who does not
3 complete and mail a timely Election Not to Participate in Settlement in the manner
4 and by the deadline specified in the Settlement Agreement will be bound by all
5 terms and conditions of the Settlement, if the Settlement is approved by the Court,
6 and by the Judgment, regardless of whether he or she has objected to the
7 Settlement. *See* Settlement Agreement § III (E)(4)(b).

8 **E. Right to Object**

9 Class members who wish to object to the Settlement must file with the Court
10 and serve on counsel for the Parties, not later than ninety (90) days after the Court
11 enters its order granting Preliminary Approval of the Settlement Administrator, a
12 written objection to (i) the Settlement, and/or (ii) Plaintiffs and Class Counsel's
13 request for the Class Representative Payments, or the Class Counsel Fees and
14 Litigation Expense Payment. Class members who fail to file and serve timely
15 written objections will be deemed to have waived any objections and will be
16 foreclosed from making any objection (whether by appeal or otherwise) to the
17 Settlement. *See* Settlement Agreement § III (E)(4)(a).

18 **F. Incentive Payments to Class Representatives**

19 After the Parties agreed to the Class benefits, Mr. Dickstein proposed, and
20 the Parties agreed, that Sur La Table would not object to a request by Plaintiffs for
21 the Court's approval of an award of incentive payments of \$4,000.00 to each
22 Plaintiff in recognition of the risk to them as the Class representatives in
23 commencing the Action, both financial and otherwise, and the amount of time and
24 effort spent by Plaintiffs as the Class representatives. *See* Settlement Agreement §
25 III(C).

26 Accordingly, in the event this Settlement Agreement receives Final Judicial
27 Approval, Sur La Table will pay, within thirty (30) calendar days after the
28 Judgment becomes final, an incentive award of \$4,000.00 each to proposed Class

1 Representatives Amanda Georgino, Nancy Dardarian, and Linda Petersen. *See*
2 Settlement Agreement § III(E)(9).

3 Plaintiffs will provide further supporting documentation and briefing
4 regarding the agreed upon awards for the named Plaintiffs' incentive payments in
5 their Motion for an Award of Attorneys' Fees and Costs to Class Counsel and for
6 Incentive Awards to the Class Representatives.

7 **G. Attorneys' Fees and Costs**

8 After the Parties reached an agreement as to the Class benefits, Mr.
9 Dickstein proposed, and the Parties agreed, that Sur La Table would not object to a
10 request by Plaintiffs for the Court's approval of an award of attorneys' fees and
11 costs in the amount of \$425,000.00. The Parties agreed that an award of attorneys'
12 fees and costs in the amount of \$425,000.00 to Class Counsel represents a fair and
13 commensurate amount in view of the nature of the Action and the risks and costs
14 incurred. *See* Settlement Agreement § III(C).

15 Accordingly, in the event the Parties' Settlement Agreement receives Final
16 Judicial Approval and these attorneys' fees and costs amounts are approved by this
17 Court, Sur La Table will pay, within thirty (30) calendar days after the Judgment
18 becomes final, proposed Class Counsel's attorneys' fees and costs in the amount of
19 \$425,000.00 separate and apart from any benefits to the Class, in full satisfaction
20 of any and all claims for attorneys' fees and costs arising out of or relating to this
21 Action including this Settlement. *Id.*

22 Plaintiffs will provide further supporting documentation and briefing
23 regarding the agreed upon awards for attorneys' fees and costs in their Motion for
24 an Award of Attorneys' Fees and Costs to Class Counsel and for Incentive Awards
25 to the Class Representatives. Plaintiffs' Motion for attorneys' fees will be filed
26 prior to the objection deadline. *See In re Mercury Interactive Corp. Sec. Litig.*,
27 618 F.3d 988 (9th Cir. 2010).

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1 **H. Settlement Implementation Costs**

2 Sur La Table will bear all costs of providing Class Notice in the manner set
3 forth in the Settlement Agreement and all costs associated with the administration
4 of the Settlement. *See* Settlement Agreement §III(D).

5 **IV. THE PROPOSED SETTLEMENT IS FAIR AND SHOULD RECEIVE**
6 **PRELIMINARY APPROVAL**

7 **A. The Proposed Settlement Meets All Criteria Establishing**
8 **Fairness.**

9 As explained by the court in *In re Immune Response Secs. Litigation*, 497 F.
10 Supp. 2d 1166, 1169-1170 (S.D. Cal. 2007):

11 "Although Rule 23(e) is silent respecting the standard by which a
12 proposed settlement is to be evaluated, the universally applied
13 standard is whether the settlement is fundamentally fair, adequate and
14 reasonable.' *Officers for Justice*, 688 F.2d at 625; see also *Torrissi v.*
15 *Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). When
16 determining whether approval of a settlement is warranted, courts
17 consider 'several factors which may include, among others, some or
18 all of the following: [1] the strength of Plaintiffs' case; [2] the risk,
19 expense, complexity, and likely duration of further litigation; [3] the
20 risk of maintaining class action status throughout the trial; [4] the
21 amount offered in settlement; [5] the extent of discovery completed,
22 and the stage of the proceedings; [6] the experience and views of
23 counsel; [7] the presence of a governmental participant; and [8] the
24 reaction of the class members to the proposed settlement.' *Torrissi*, 8
25 F.3d at 1375; see also *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026
26 (9th Cir. 1998). Further, '[t]o survive appellate review, the district
27 court must show it has explored comprehensively all [fairness]
28 factors.' *Hanlon*, 150 F.3d at 1026 (citing *Protective Comm. for*
Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390
U.S. 414, 434, 88 S. Ct. 1157, 20 L. Ed. 2d 1 (1968)). Finally, 'the
settlement may not be the product of collusion among the negotiating
parties.' [*In re*] *Mego Financial Corp. Sec. Litigation*, 213 F.3d [454]
at 458 [(9th Cir. 2000)] (citing *Class Plaintiffs v. City of Seattle*, 955
F.2d 1268, 1290 (9th Cir. 1992))."¹

¹ The guidance of Rule 23(e)(2) of the Federal Rules of Civil Procedure on the approval of a class action settlement is that it must be "fair, reasonable, and adequate."

1 **1. *Strength of Plaintiffs' Case***

2 Plaintiffs assert that Sur La Table violated California Civil Code section
3 1747.08 in that as part of processing its customers' credit card transactions, Sur La
4 Table requested and recorded customers' personal identification information.
5 California Civil Code section 1747.08, its present form, states in relevant part:

6 (a) Except as provided in subdivision (c), no person,
7 firm, partnership, association, or corporation which
8 accepts credit cards for the transaction of business shall
9 do either of the following:

10 (2) *Request*, or require as a condition to accepting the
11 credit card as payment in full or in part for goods or
12 services, *the cardholder to provide personal*
13 *identification information, which the person, firm,*
14 *partnership, association, or corporation accepting the*
15 *credit card writes, causes to be written, or otherwise*
16 *records upon the credit card transaction form or*
17 *otherwise."* Cal. Civ. Code § 1747.08(a)(2) (emphasis
18 added).

19 California Civil Code section 1747.08 is part of the Song-Beverly Credit
20 Card Act and was designed to promote consumer protection; the Act imposes fair
21 business practices for the protection of consumers. *Florez v. Linens 'N Things,*
22 *Inc.*, 108 Cal. App. 4th 447, 450 (2003) (*citing Young v. Bank of Am.*, 141 Cal.
23 App. 3d 108 (1983)). Plaintiffs contend that Section 1747.08 was originally
24 enacted as a response to two principal privacy concerns: first, that with increased
25 use of computer technology, very specific and personal information about a
26 consumer's spending habits was being made available to anyone willing to pay for
27 it; and second, that acts of harassment and violence were being committed by store
28 clerks who obtained customers' phone numbers and addresses. *Id.* at 452; *see also*
Off. of Sen. Floor Analyses, 3d Reading Analysis of Assem. Bill No. 1316 (1995-
1996 Reg. Sess.) July 18, 1995, p. 3.

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1 Additionally, Plaintiffs contend the statute was intended to keep the
2 customer's credit card number separate and apart from his or her personal
3 information such as address, telephone number, birth date, etc., in order to prevent
4 thieves from obtaining both at the same time (*i.e.*, "dumpster diving") and
5 engaging in credit card fraud, usually over the telephone. Assem. Floor Analysis,
6 3d Reading of Assem. Bill No. 2533 (1995-1996 Reg. Sess.) May 15, 1996, pp. 1-
7 2. When drafting 1747.08, the Legislature was well aware that anyone with access
8 to a consumer's credit card number and address could access their credit history,
9 open credit in their name, or charge something in their name. Dept. Consumer
10 Affairs, Analysis of Assem. Bill No. 1316 (1995-1996 Reg. Sess.) p. 1.

11 Last year, the California Supreme Court issued its unanimous opinion in
12 *Pineda v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011), confirming that
13 ZIP codes are "personal identification information" as defined in section 1747.08.
14 *Pineda*, 51 Cal. 4th at 524. Pursuant to California Civil Code section 1747.08(e), a
15 violator of the statute shall be liable for a civil penalty of up to \$250.00 for the first
16 violation and up to \$1,000.00 for each subsequent violation of the statute. Cal.
17 Civ. Code § 1747.08(e). Although a violator of the statute is subject to a
18 mandatory civil penalty, the amount of the civil penalty to be imposed against a
19 Defendant is discretionary. Civil penalties could be as little as a penny or the
20 "proverbial peppercorn." *See The TJX Companies, Inc. v. Superior Court*, 163 Cal.
21 App. 4th 80, 86-87 (2008).

22 Sur La Table denies any wrongdoing in this case. Sur La Table contends
23 that, from February 16, 2010 to February 11, 2011, its sales associates requested
24 and recorded personal identifying information from Sur La Table customers,
25 regardless of form of tender, only after the customer voluntarily requested to be
26 included on Sur La Table's preferred mailing list. Accordingly, Sur La Table
27 maintains that no customer paying with a credit would reasonably believe that
28 providing his or her personal information was a condition for completing a credit

1 card transaction. Sur La Table therefore contends that there is no liability under
2 section 1747.08 and that the proposed class is overbroad and cannot be certified.
3 *See Gass v. Best Buy*, 279 F.R.D. 561, 572-573 (C.D. Cal. 2012).

4 In determining whether the settlement is fair, the Court has to assess whether
5 the relief offered by the settlement is reasonable, in light of the claims to be
6 released. At this stage, the Court need only to conduct a *prima facie* review of the
7 relief and notice provided by the settlement to determine whether notice should be
8 sent to the settlement class members. *In re Immune Response*, 497 F.Supp.2d at
9 1172. It is simply "not appropriate for the court to attempt to settle these questions
10 of law and fact: '[T]he settlement or fairness hearing is not to be turned into a trial
11 or rehearsal for trial on the merits. Neither the trial court nor [the appellate court]
12 is to reach any ultimate conclusions on the contested issues of fact and law which
13 underlie the merits of the dispute, for it is the very uncertainty of outcome in
14 litigation and avoidance of wasteful and expensive litigation that induce
15 consensual settlements.'" *Id.* (citing *Officers of Justice v. Civil Service Com.*, 688
16 F.2d 615, 625 (9th Cir. 1982)).

17 In sum, "the merits of the underlying class claims are not a basis for
18 upsetting the settlement of a class action; the operative word is 'settlement.'" 7-
19 *Eleven Owners for Fair Franchising v. Southland Corp.*, 85 Cal.App.4th 1135,
20 1150 (2000). Even "[t]he fact that a proposed settlement may only amount to a
21 fraction of the potential recovery does not, in and of itself, mean that the proposed
22 settlement is grossly inadequate and should be disapproved." *Detroit v. Grinnell*
23 *Corp.*, 495 F.2d 448, 455 (2nd. Cir. 1974).

24 Plaintiffs believe that their case is strong in light of the California Supreme
25 Court's unanimous decision in *Pineda* confirming that "requesting and recording a
26 cardholder's [personal identification information], without more, violates the
27 [California] Credit Card Act." *Pineda*, 51 Cal.4th at 527-28. The outcome of this
28 case is uncertain, however, and if Sur La Table was to prevail on its arguments, the

1 Class would obtain little or nothing through litigation. Even if Plaintiffs were to
2 convince the Court to certify the Class after a contested motion for class
3 certification and eventually establish liability at trial, then the amount of the civil
4 penalty to be awarded (somewhere between a penny and \$1,000) would rest within
5 the sound discretion of the trial court. *Id.* at 536. As such, if Plaintiffs and the
6 Class succeed at trial, the amount of the civil penalties to be awarded by the Court
7 is uncertain.

8 **2. *The Risk, Expense, Complexity, and Duration of Further***
9 ***Litigation and the Risk of Maintaining Class Action Status***
10 ***Through Trial***

11 The settlement takes into account the risk, expense, and complexity of
12 further litigation. Plaintiffs and the Class would have to retain additional experts
13 to conduct forensic analysis of the recording and storage of Sur La Table's
14 customer information, as well as experts to testify to the value of the collected
15 information. Stonebarger Decl. at ¶5.

16 Sur La Table would vigorously oppose Plaintiffs' attempt to get a class
17 certified and may also retain experts to defeat certification and the Class claims.
18 *Id.*

19 Additional time consuming and expensive law and motion proceedings
20 would be necessary to narrow or eliminate the claims and defenses both at the
21 certification stage and the trial stage. The time and expense of further litigation
22 could potentially negatively impact Sur La Table's business operations and would
23 interfere with potential Class members' opportunity to obtain benefits promptly.
24 Accordingly, the settlement at this stage in the litigation benefits the Court and the
25 Parties, as well as the Class. *Id.*

26 **3. *The Benefits Offered in Settlement***

27 All Class members for whom Sur La Table has an email or home address
28 (approximately 92,200 individuals), and all other Class members who submit a
timely and valid Claim Form which establishes his or her membership in the Class,

1 will receive a \$13.00 Merchandise Certificate for use at any Sur La Table
2 California retail store. Such recovery to the proposed Settlement Class is *without*
3 any risk of the Class not being certified and is without any risk that Plaintiffs will
4 not prevail as to liability and/or penalties. While the dollar value of the settlement
5 per Class member may be relatively small, it must be remembered that any
6 allegation of alleged harm may be difficult to prove. *See Chavez v. Netflix,*
7 *Inc.*, 162 Cal.App.4th 43, 55 (2008) (Six dollar benefit provided by the settlement -
8 free DVD rentals - directly addresses the harm alleged in the complaint. While the
9 dollar value of the settlement per class member is small, Plaintiffs would have
10 encountered considerable difficulties in trying to prove their amount.).

11 **4. *The Extent of Discovery and Stage at Which Settlement Is***
12 ***Reached***

13 It is *not* the law that a class action cannot be settled until the last particle of
14 discovery has been completed and analyzed. *See In re Corrugated Container*
15 *Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981) ("It is true that very little formal
16 discovery was conducted and that there is no voluminous record in the case.
17 However, the lack of such does not compel the conclusion that insufficient
18 discovery was conducted") (emphasis omitted).

19 Through mutual exchange of formal discovery, Plaintiffs believe they have
20 discovered both the evidence needed to establish their *prima facie* cases and to
21 address the full range of contentions advanced by Sur La Table. In that process,
22 among other things, Sur La Table provided Plaintiffs with information relating to
23 its policies and practices regarding the collection of personal identification
24 information and the approximate total number of Class members as defined by
25 Plaintiffs. As such, while Sur La Table disagrees with Plaintiffs' assessment of
26 the evidence produced, Sur La Table agrees that counsel for each of the Parties has
27 sufficient information to assess the strengths, weaknesses, and likely expense of
28 taking this case to trial. Stonebarger Decl. at ¶6.

1 **5. *Experience and Views of Counsel***

2 Plaintiffs' counsel has extensive experience litigating consumer class actions
3 and has litigated numerous cases based upon violations of the Song-Beverly Credit
4 Card Act. Stonebarger Decl. at ¶10, Exhs. '2'-'4'. Plaintiffs' counsel has
5 represented millions of consumers in numerous consumer class actions asserting
6 violations of the Song-Beverly Credit Card Act of 1971. *Id.*

7 Based upon Plaintiffs' counsel's substantial experience, Plaintiffs' counsel
8 believes the present settlement is in the best interest of the Class members due to
9 the significant recovery to the Class members, without any risk of the Class not
10 being certified and not prevailing as to liability and/or civil penalties. *Id.* at ¶11.

11 **6. *Presence of Governmental Participants***

12 Although there is no governmental entity participating in this matter as of
13 this time, full and complete notice is being provided to all appropriate state and
14 federal authorities. Sur La Table will provide such notice, which will include all
15 appropriate information and documents required by CAFA (28 U.S.C. § 1715(b))
16 including: (1) all complaints and amended complaints filed in the Action, (2) the
17 proposed Settlement Agreement, and (3) settlement notification to Class members
18 and benefit election procedure. As such, the fact of that notice and the opportunity
19 governmental entities will have to take part in the final approval process weigh in
20 favor of preliminary approval.

21 **7. *The Proposed Settlement Resulted from Serious, Informed***
22 ***and Non-Collusive Arm's-Length Negotiations***

23 The requirement that a settlement be fair is designed to protect against
24 collusion among the parties. *See Hanlon*, 150 F.3d at 1026. Typically, "[t]here is
25 a presumption of fairness when a proposed class settlement, which was negotiated
26 at arm's-length by counsel for the class, is presented for Court approval." *Newberg*
27 *on Class Actions*, § 11.41 (4th ed. 2007); *see also Nat'l Rural Telecomm. Coop. v.*
28 *DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("Great weight" is accorded

1 to the recommendation of counsel, who are the most closely acquainted with the
2 facts of the underlying litigation."); *In re Employee Benefit Plans Sec. Litig.*, No.
3 3-92-708, 1993 WL 330595, at *5 (D. Minn. June 2, 1993) ("[t]he court is entitled
4 to rely on the judgment of experienced counsel in its evaluation of the merits of a
5 class action settlement").

6 Here, the Parties engaged the services of Michael Dickstein, Esq. of
7 Dickstein Dispute Resolution, an experienced and skilled mediator, who assisted
8 the Parties during their all-day mediation on August 21, 2012. Stonebarger Decl.
9 ¶4. Before the mediation, Class Counsel exchanged information through formal
10 discovery and obtained information from Sur La Table relating to information
11 necessary to evaluate the amount of civil penalties. *Id.* Thus, Plaintiffs and their
12 counsel, who are experienced in prosecuting this type of complex class action, had
13 "a clear view of the strengths and weaknesses" of their cases and were in a strong
14 position to make an informed decision regarding the reasonableness of a potential
15 settlement. *See, e.g., In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 745
16 (S.D.N.Y. 1985); *see also Manchaca v. Chafer*, 927 F. Supp. 962, 967 (E.D. Tex.
17 1996).

18 The fact that the Settlement was facilitated by an experienced mediator
19 confirms that it is not collusive. *See, e.g., Adams v. Inter-Con Sec. Sys. Inc.*, No.
20 C-06-5428 MHP, 2007 WL 3225466, at *3 (N.D. Cal. Oct. 30, 2007) ("The
21 assistance of an experienced mediator in the settlement process confirms that the
22 settlement is non-collusive."); *In re Indep. Energy Holdings PLC*, No. 00 Civ.
23 6689 (SAS), 2003 WL 22244676, at *4 (S.D.N.Y. Sept. 29, 2003) ("the fact that
24 the Settlement was reached after exhaustive arm's-length negotiations, with the
25 assistance of a private mediator experienced in complex litigation, is further proof
26 that it is fair and reasonable"). Further, the nature of the subsequent negotiations
27 between the Parties, the experience of counsel in this area, and the fair result
28 reached are all evidence of the arms-length nature of the negotiations that lead to

the Settlement.

V. THE PROPOSED SETTLEMENT CLASS SHOULD BE CERTIFIED

A. The Settlement Satisfies the Requirements of Rule 23(a)

Rule 23(a) enumerates four prerequisites for class certification: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy. Plaintiffs believe that each of these requirements is met.

1. *Numerosity*

Rule 23(a)(1) requires that "the class is so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a); *Wiener v. Dannon Co., Inc.*, 255 F.R.D. 658, 664 (C.D. Cal. 2009). Here, the numerosity requirement is readily met because joinder of absent class members would be exceedingly difficult.

According to Sur La Table, from February 16, 2010 through February 11, 2011, Sur La Table conducted approximately 126,000 credit card transactions at its California stores wherein Sur La Table requested and recorded customers' personal identification information, when the information was not needed for any special purpose, such as shipping, delivery, servicing, or installation of the purchased merchandise, or for special orders. As such, the numerosity requirement is satisfied. Stonebarger Decl. at ¶7.

2. *Commonality*

"The existence of shared legal issues with divergent factual predicates is sufficient [to satisfy commonality], as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019; *In re First Alliance Mortg. Co.*, 471 F.3d 977, 990-91 (9th Cir. 2006). The commonality requirement is construed "permissively." *Hanlon*, 150 F.3d at 1019; *Wiener*, 255 F.R.D. at 664.

In this case, there are multiple "common issues" affecting the entire Class and Sur La Table's liability; mainly, whether Sur La Table's conduct of requesting and recording customers' personal identification information from its credit card

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1 customers violates California Civil Code section 1747.08. Though the Parties
2 dispute whether such conduct in fact constitutes a violation of section 1747.08, the
3 issue is nonetheless common amongst the Class. Stonebarger Decl. at ¶8.

4 **3. Typicality**

5 Rule 23(a)(3) typicality is satisfied where the plaintiffs' claims are
6 "reasonably coextensive" with absent class members' claims; they need not be
7 "substantially identical;" *Hanlon*, 150 F.3d at 1020; *see also Wiener*, 255 F.R.D. at
8 665. The test for typicality "is whether other members have the same or similar
9 injury, whether the action is based on conduct which is not unique to the named
10 Plaintiffs, and whether other class members have been injured by the same course
11 of conduct." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).
12 Thus, "[t]he purpose of the typicality requirement is to assure that the interest of
13 the named representative aligns with the interests of the class." *Id.*

14 Plaintiffs allege that they were exposed to the same alleged unlawful policy
15 and practice of Sur La Table. Specifically, Plaintiffs allege that Sur La Table
16 requested and recorded their personal identification information during a credit
17 card purchase transaction which constituted a violation of section 1747.08.
18 Importantly, Plaintiffs do not allege any claims or facts unique to themselves.
19 Thus, the requirement of typicality is satisfied. Stonebarger Decl. at ¶9.

20 **4. Adequacy**

21 Rule 23(a)(4) requires that "the representative parties will fairly and
22 adequately protect the interests of the class." Adequacy is satisfied where (i)
23 counsel for the class is qualified and competent to prosecute the action vigorously,
24 and (ii) the interests of the proposed class representatives are not antagonistic to
25 the interests of the Class. *See, e.g., Staton v. Boeing*, 327 F.3d 938, 957 (9th Cir.
26 2003); *Hanlon*, 150 F.3d at 1020; *Weiner*, 225 F.R.D. at 667.²

27 ² Rule 23(g)(1) also requires the Court to appoint class counsel. Plaintiffs request the Court appoint the law firms of
28 Stonebarger Law, APC, Patterson Law Group, APC, and Hoffman & Lazear as Class Counsel.

1 Plaintiffs have retained counsel with significant experience in prosecuting
2 large consumer protection class actions. Stonebarger Decl. at ¶10, Exhibits '2'-'4'.
3 Likewise, each of the Plaintiffs is a member of the proposed Class and has the
4 same interests as the Class in maximizing the recovery from Sur La Table. They
5 allege that Sur La Table requested and recorded each of their personal
6 identification information during a credit card purchase transaction which
7 constituted a violation of section 1747.08. Additionally, they do not allege any
8 claims or facts unique to themselves or that conflict with the claims of absent Class
9 members. Thus, Plaintiffs are adequate representatives.

10 **B. The Settlement Class Should be Certified Under Rule 23(b)(3)**

11 The Parties request that the Court, for the purposes of settlement, certify a
12 class of the following individuals under Rule 23(b)(3): "all individuals who used a
13 credit card issued for consumer credit purposes to purchase goods or services from
14 one of Defendant's retail stores (either in person or over the phone) in the State of
15 California during the period of time between February 16, 2010 through February
16 11, 2011, and whose personal identification information was requested and
17 recorded by Defendant for any reason other than a special order, installation, or
18 delivery."

19 Certification under Rule 23(b)(3) is appropriate "whenever the actual
20 interests of the parties can be served best by settling their difference in a single
21 action." *Hanlon*, 150 F.3d at 1022 (quoting 7A C.A. Wright, A.R. Miller, & M.
22 Kane, *Federal Practice & Procedure* § 1777 (2d ed. 1986)).

23 There are two fundamental conditions to certification under Rule 23(b)(3):
24 (1) questions of law or fact common to the members of the class predominate over
25 any questions affecting only individual members; and (2) a class action is superior
26 to other available methods for the fair and efficient adjudication of the controversy.
27 Fed. R. Civ. P. 23(b)(3); *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund*
28 *v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162-63 (9th Cir. 2001); *Hanlon*, 150

1 F.3d at 1022; *Wiener*, 255 F.R.D. at 668. Rule 23(b)(3) encompasses those cases
2 "in which a class action would achieve economies of time, effort, and expense, and
3 promote... uniformity of decision as to persons similarly situated, without
4 sacrificing procedural fairness or bringing about other undesirable results."
5 *Amchem v. Windsor*, 521 U.S. 591, 615 (1997) (citations omitted and alterations in
6 original); *Wiener*, 255 F.R.D. at 668.

7 **1. Common Questions Predominate Over Individual Issues**

8 The Rule 23(b)(3) predominance inquiry "tests whether proposed classes are
9 sufficiently cohesive to warrant adjudication by representation." *Amchem*, 521
10 U.S. at 623. "Predominance is a test readily met in certain cases alleging
11 consumer. . . fraud. . . ." *Id.* "When common questions present a significant aspect
12 of the case and they can be resolved for all members of the class in a single
13 adjudication, there is clear justification for handling the dispute on a representative
14 rather than on an individual basis." *Fed Prac. & Proc.*, § 1778; *Gen. Tel. Co. of*
15 *Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting commonality and typicality
16 tend to merge).

17 The predominance requirement is satisfied here. As discussed above,
18 Plaintiffs allege Class members are entitled to the same legal remedies based on
19 the same alleged wrongdoing: exposure to the same alleged policy. The central
20 issue for every claimant is whether Sur La Table requested and recorded
21 customers' personal identification information in connection with credit card
22 transactions. Under these circumstances, there is sufficient basis to find that the
23 requirements of Rule 23(b)(3) are satisfied. *See Weiner*, 255 F.R.D. at 669;
24 *Hanlon*, 150 F.3d at 1022.

25 **2. A Class Action is the Superior Method to Settle this**
26 **Controversy**

27 Rule 23(b)(3) sets forth the relevant factors for determining whether a class
28 action is superior to other available methods for the fair and efficient adjudication

1 of the controversy. These factors include: (i) the class members' interest in
2 individually controlling separate actions; (ii) the extent and nature of any litigation
3 concerning the controversy already begun by or against class members; (iii) the
4 desirability or undesirability of concentrating the litigation of the claims in the
5 particular forum; and (iv) the likely difficulties in managing a class action. Fed. R.
6 Civ. P. 23(b)(3); *see Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1190-92
7 (9th Cir. 2001). "[C]onsideration of these factors requires the court to focus on the
8 efficiency and economy elements of the class action so that cases allowed under
9 subdivision (b)(3) are those that can be adjudicated most profitably on a
10 representative basis." *Zinser*, 253 F.3d at 1190 (citations omitted); *see also*
11 *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (finding
12 superiority requirement may be satisfied where granting class certification "will
13 reduce litigation costs and promote greater efficiency").

14 Application of the Rule 23(b)(3) "superiority" factors shows that a class
15 action is the preferred procedure for this Settlement. The amount of potential
16 monetary relief to which an individual class member would be entitled is not large.
17 *Zinser*, 253 F.3d at 1191; *Wiener* 255 F.R.D. at 671. It is neither economically
18 feasible, nor judicially efficient, for the hundreds of thousands of Class members to
19 pursue their claims against Defendant on an individual basis. *Deposit Guar. Nat'l*
20 *Bank v. Roper*, 445 U.S. 326, 338-39 (1980); *Hanlon*, 150 F.3d at 1023; *Vasquez v.*
21 *Superior Court*, 4 Cal. 3d 800, 808 (1971). Additionally, the fact of settlement
22 eliminates any potential difficulties in managing the trial of these actions as class-
23 actions. When "confronted with a request for settlement-only class certification, a
24 district court need not inquire whether the case, if tried, would present intractable
25 management problems . . . for the proposal is that there be no trial." *Amchem*, 521
26 U.S. at 620.

27 ///

28 ///

1 **VI. THE PROPOSED CLASS NOTICE PROGRAM IS APPROPRIATE,**
2 **AND CLASS NOTICE SHOULD BE APPROVED**

3 The threshold requirement concerning the sufficiency of class notice is
4 whether the means employed to distribute the notice is reasonably calculated to
5 apprise the class of the pendency of the action, of the proposed settlement, and of
6 the class members' rights to opt out or object. *Eisen v. Carlisle & Jacquelin*, 417
7 U.S. 156, 173-74 (1974); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S.
8 306, 315 (1950). The mechanics of the notice process are best left to the discretion
9 of the court, subject only to the broad "reasonableness" standards imposed by due
10 process.

11 In this Circuit, it has long been the case that a notice of settlement will be
12 adjudged satisfactory if it "generally describes the terms of the settlement in
13 sufficient detail to alert those with adverse viewpoints to investigate and to come
14 forward and be heard." *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 575 (citing
15 *Mendoza v. Tucson Sch. Dist. No. 1*, 623 F.2d 1338, 1352 (9th Cir. 1980)); *Hanlon*,
16 150 F.3d at 1025 (notice should provide each absent class member with the
17 opportunity to opt-out and individually pursue any remedies that might provide a
18 better opportunity for recovery).

19 The proposed Class Notice (the Class Notice, the Email Notice, the In-Store
20 Notice and the Postcard Notice) meet these standards. *See* Settlement Agreement,
21 Exhs. 'A', 'E'-'F' to Exhibit 'I' (collectively, the "Notice"). The Notice is written in
22 simple, straightforward language and includes: (1) basic information about the
23 lawsuit; (2) a description of the benefits provided by the Settlement; (3) an
24 explanation of how Class members can obtain Settlement benefits; (4) an
25 explanation of how Class members can exercise their right to opt-out or object to
26 the Settlement; (5) an explanation that any claims against Sur La Table that could
27 have been litigated in these actions will be released if the Class member does not
28 opt out from the Settlement; (6) the names of Class Counsel and information

1 regarding attorneys' fees and expenses and Plaintiffs' incentive awards; (7) the
2 Final Fairness Hearing date; (8) an explanation of eligibility for appearing at the
3 Final Fairness Hearing; and (9) the Settlement Website where additional
4 information can be obtained. *Id.*

5 Collectively, the Notice provides Class members with sufficient information
6 to make an informed and intelligent decision about the Settlement. As such, they
7 satisfy the content requirements of Rule 23. *See In re Compact Disc Minimum*
8 *Advertised Price Antitrust Litig.*, 216 F.R.D. 197, 203 (D. Me. 2003) ("notice must
9 describe fairly, accurately and neutrally the claims and parties in the litigation
10 entitled to participate, including the right to exclude themselves from the class").

11 Additionally, the proposed dissemination of Notice to Class members
12 satisfies all due process requirements. The Settlement provides that Sur La Table
13 will provide notice to the Class after preliminary approval of the Settlement by the
14 Court. Class members will receive direct Notice via email, mail, and/or through
15 conspicuous in-store postings. *See* Settlement Agreement § III(E)(2)(a)-(d). And,
16 the full Class Notice will be available on the Settlement Website. *Id.* at § I(G). In
17 sum, the contents and dissemination of the proposed Class Notice constitutes the
18 best notice practicable under the circumstances and fully complies with the
19 requirements of Rule 23.

20 **VII. IF THE SETTLEMENT IS PRELIMINARILY APPROVED, THE**
21 **COURT SHOULD SCHEDULE A HEARING ON FINAL**
22 **SETTLEMENT APPROVAL**

23 Following notice to the Class members, a fairness hearing is to be held on
24 the proposed settlement. *See* Manual for Complex Litigation section 21.633. It is
25 requested that the Court schedule a hearing on final approval of the settlement to
26 be held approximately 120 days after entry of the Preliminary Approval Order.
27 The hearing on the final settlement approval should be scheduled now so that the
28 date can be disclosed in the class notice. Accordingly, it is requested that this Court
schedule a hearing on final approval of the settlement for April 22, 2013, at 10:00

1 a.m.

2 **VIII. CONCLUSION**

3 Based upon the foregoing, and because the proposed settlement is fair,
4 reasonable, and advantageous to the proposed Class members, Plaintiffs
5 respectfully request that the Court enter an Order:

6 (1) preliminarily approving the Settlement Agreement as being fair,
7 reasonable, and adequate;

8 (2) preliminarily approving the form, manner, and content of the Class
9 Notice, In-Store Notice, Summary Postcard Class Notice, and Claim Form;

10 (3) provisionally certifying the Class under Rule 23 of the Federal Rules of
11 Civil Procedure for settlement purposes only;

12 (4) appointing Plaintiffs Amanda Georgino, Linda Petersen, and Nancy
13 Dardarian as the Class representatives;

14 (5) appointing the law firms of Stonebarger Law, APC, Patterson Law
15 Group, APC, and Hoffman & Lazear as Class Counsel; and

16 (6) setting the Final Approval Hearing on April 22, 2013 at 10:00 a.m.

17 Dated: November 30, 2012 STONEBARGER LAW, APC

18
19 By: /s/ Gene J. Stonebarger

20 Gene J. Stonebarger

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